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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

SAMUEL A. BONACCURSO,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. Where the Commonwealth failed to disclose to the defense favorable evidence, the existence of an eyewitness who contradicted the Commonwealth's chief identification witness, until the trial was almost concluded, was there a violation of *Brady v. Maryland*?

II. Where the Pennsylvania Courts have interpreted their discovery rule to permit the prosecutor to refuse pre-trial disclosure of the existence, as well as the identification, of eyewitnesses to a crime, did this violate *Wardius v. Oregon* and deprive Petitioner of due process?

III. Where the prosecutor failed to disclose the existence of eyewitnesses, and Petitioner believed there was only a legal issue involved in the case, was his waiver of jury trial a knowing and intelligent waiver of his constitutional right?

IV. Where defense counsel failed to file a motion for discovery, thereby failing to learn of the existence and identity of eyewitnesses to a crime; and where he thereafter failed to request a continuance when those eyewitnesses were called to testify at a bench trial, thus preventing him from investigating and preparing for cross-examination; and where he failed to seek to withdraw the Petitioner's waiver of jury trial after learning of the eyewitnesses and of the existence of a factual dispute; and where he also failed to argue to the court on degrees of murder, has Petitioner been deprived of effective assistance of counsel?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

SAMUEL BONACCURSO, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled case on January 28, 1983.

OPINIONS BELOW

On January 28, 1983, the Supreme Court of Pennsylvania entered a judgment and filed an Opinion, reported in 455 A.2d 1175, and reproduced in Appendix A, *infra*, pages A1-A8, affirming the judgments of conviction and sentences entered by the Court of Common Pleas, Trial Division, Criminal Section of Philadelphia County, on January 14, 1980. On that date Honorable Edwin S. Malmed, Judge of said Court, sentenced Petitioner who had been found guilty of first degree murder and possession of an instrument of crime, to life imprisonment on the murder conviction and to a concurrent two and one-half to five year sentence on the weapons offense. On August 21, 1980, Judge Malmed filed an Opinion, explaining his denial on January 14, 1980 of the Post-Trial Motions. Said Opinion has not yet been officially recorded, and a copy is reproduced herein in Appendix B, *infra*, pages A9 -A17.

JURISDICTION

The judgment and Opinion of the Supreme Court of Pennsylvania (Appendix A, *infra*, pages A1-A8), affirming the judgments of conviction and sentences of the Court of Common Pleas of Philadelphia County, was entered January 28, 1983. A timely petition for extension of time for filing this Petition Writ of Certiorari was granted by the Justice Brennan on May 14, 1983, granting an extension until April 28, 1983. A copy of Justice Brennan's Order is reproduced herein as Appendix C, *infra*, page A18. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND RULE OF COURT INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> " . . . nor shall any state deprive any person of life, liberty or property without due process of law; . . . "

The Pennsylvania Rules of Criminal Procedure provide in pertinent part:

RULE 305. PRE-TRIAL DISCOVERY AND INSPECTION.

* * * *

B. DISCLOSURE BY THE COMMONWEALTH.

(1) MANDATORY:

In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused which is material either to guilt or to punish-

ment, and which is within the possession or control of the attorney for the Commonwealth;

* * * *

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant, which are within the possession or control of the attorney for the Commonwealth;

* * * *

(2) DISCRETIONARY WITH THE COURT:

In all court cases, except as otherwise provided in Rule 263 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:

(a) The names and addresses of eyewitnesses;

(b) all written or recorded statements, and substantially verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial;

(c) all written or recorded statements, and substantially verbatim oral statements, made by co-defendants, and by co-conspirators or accomplices, whether such individuals have been charged or not;

(d) any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice.

C. DISCLOSURE BY THE DEFENDANT:
(1) MANDATORY:

(a) Notice of Alibi Defense:

* * *

(b) Notice of Insanity or Mental Infirmity Defense:

* * *

(c) Disclosure of Reciprocal Witnesses:

* * *

(2) DISCRETIONARY WITH THE COURT:

In all court cases, if the Commonwealth files a motion for pretrial discovery, the court may order the defendant, subject to the defendant's rights against compulsory self-incrimination, to allow the attorney for the Commonwealth to inspect and copy or photograph any of the following requested items, upon a showing of materiality to the preparation of the Commonwealth's case and that the request is reasonable:

(a) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief, or which were prepared by a witness whom the defendant intends to call at the trial, when results or reports relate to the testimony of that witness, provided the defendant has requested and received discovery under paragraph B(1)(e);

(b) the names and addresses of eyewitnesses whom the defendant intends to call in its case in chief, provided that the defendant has previously requested and received discovery under paragraph B(2)(a).

D. CONTINUING DUTY TO DISCLOSE:

If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material or witness.

E. REMEDY:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

F. PROTECTIVE ORDERS:

Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court(s) in the event of an appeal.

* * *

COMMENT: This rule is intended to apply only to court cases; the constitutional guarantees mandated in Brady v. Maryland, *373 U.S. 83 (1963), and the refinements of the* Brady *standards embodied in subsequent judicial de-*

cisions, apply to all cases, including court cases and summary cases, and nothing to the contrary is intended. For definitions of "court case" and "summary case", see Rule 3.

In determining the extent to which pretrial discovery should be ordered under the "Discretionary with the Court" sections of this rule, judges may be guided by the following general principles of ABA Standards Relating to Discovery and Procedure Before Trial *(Approved Draft, 1970):*

* * *

Sec. 1.2.: Scope of Discovery.

> *In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.*

* * *

> *The notice-of-alibi provision of this rule contained in part C(1)(a) is intended to comply with the requirement of* Wardius v. Oregon, *412 U. S. 470 (1973), by the inclusion of reciprocal disclosure responsibilities placed upon the Commonwealth in paragraph C(1)(c). This rule thus replaces former Rule 312, which was rescinded on June 29, 1973, pursuant to* Wardius, supra. See also Commonwealth v. Contakos, *455 Pa. 136, 314.A2d 259 (1974). The provision requiring a notice of insanity defense, paragraph C(1)(b), has not previously been included in these rules, but the safeguards surrounding them have been made identical to those protecting the defendant under the notice-of-alibi provision.*

The provisions for a protective order, part F, does not confer upon the Commowealth any right of appeal not presently afforded by statute.

* * *

It should also be noted that as to material which is discretionary with the court, or which is not enumerated in the rule, if such information contains exculpatory evidence as would come under the Brady *rule, it must be disclosed. Nothing in this rule is intended to limit in any way disclosure of evidence constitutionally required to be disclosed.*

* * *

STATEMENT OF THE CASE

The Petition before this Court seeks review of a decision affirming the convictions of first degree murder and of Possession of Instrument of Crime, and the sentences imposed thereon.

On April 30, 1978, shortly after 5:00 P.M., Ronald Simone was shot and killed in front of a garage at 1125 South 13th Street, Philadelphia, Pennsylvania. On the following day, a Complaint was sworn by Homicide Detective Albert Paris charging Petitioner (hereinafter referred to as Defendant) Samuel A. Bonaccurso, with Murder, Possession of Instrument of Crime, Possession of Offensive Weapon, and violations of the Uniform Firearms Act. He was arrested on said Complaint, given a preliminary arraignment and released on $3,000 bail. At his preliminary hearing, one witness was called, Joseph DiFillippo, an alleged eyewitness to the shooting, who had given a statement to the police following the shooting identifying Samuel A. Bonaccurso as the person who had fired the fatal shots. At the preliminary hearing, however, that witness was represented by counsel and refused to testify, claiming his constitutional privilege against self-incrimination. The presiding Municipal Court Judge overruled his claim of privilege as to many questions and required him to answer. In part, DiFillippo recanted his former statement, claiming that the Defendant in the courtroom was not the person he had seen fire the shots. The Judge permitted the Commonwealth to introduce his statement into evidence and held the Defendant for Court on all charges.

On June 7, 1978, four informations were filed against the Defendant: Bill No. 115, containing three counts charging Possession of Instrument of Crime, Possession of Instrument of Crime Concealed Weapon, and Possession of Offensive Weapon (R. 3a-4a);[1] Bill

1. References preceded by an "R." are to the Reproduced Record printed for and filed in the Supreme Court of Pennsylvania. References preceded by "N.T." are to these portions of the Notes of Testimony of the Trial or Post-Trial Hearing which were not reproduced in said Record.

No. 116, containing three counts charging Carrying a Firearm on Public Streets, Carrying a Firearm without a license, and Carrying a Firearm without a license in a vehicle (R. 5a-6a); Bill No. 117, charging involuntary manslaughter (R. 7a-8a); Bill No. 117, charging two counts, murder and voluntary manslaughter (R. 9a-10a).

On June 6, 1978, Defendant's attorney, Robert F. Simone, Esquire, sent a letter to the Assistant District Attorney handling the case who was the Chief of the Homicide Division, requesting discovery in accordance with the Rules of Criminal Procedure (R. 158a-159a). By letter dated June 27, 1978, Mr. Murray replied, agreeing to provide certain information but denying requests for statements of eyewitnesses and names and statements of others (R. 160a). No pre-trial motions were filed, seeking discovery, suppression of eyewitness identification or any other relief.

On December 1, 1978, Defendant and his counsel signed a waiver of Jury Trial (R. 11a) and waived the right to jury trial on the record (R.13a-23a). Trial commenced before Honorable Edwin S. Malmed without a jury, and on December 12, 1978, Judge Malmed found defendant guilty of murder in the first degree and Possession of an Instrument of Crime (R. 155a-166a); he found him not guilty of Carrying Firearms on Public Streets (R. 159a), and the Bill on involuntary manslaughter was withdrawn by the prosecution (R. 156a). Timely post-verdict motions were filed (R. 165a-168a, 169a-170a). Subsequently, on February 9, 1979, Attorney Simone, anticipating an argument reflecting on his effectiveness as trial counsel, filed a motion for leave to withdraw his appearance, and on February 13, the trial court permitted him to withdraw and Stanford Shmukler, Esquire, entered his appearance (R. 2a). New counsel filed additional and supplemental grounds in support of post-verdict motions (R. 171a-172a). Testimony was taken in support of these motions on four sep-

arate days (June 19, 1979, R. 133a *et seq.*; June 22, 1979, R. 236a *et seq.*; July 13, 1979, R. 267a *et seq.*; and July 19, R. 369a *et seq.*). On January 14, 1980, Judge Malmed denied the motions (R. 410a *et seq.*) and imposed sentence (R. 417a-418a). A timely appeal was filed and on August 21, 1980, Judge Malmed filed an Option in support of his decision (Appendix B, *infra*, pages A9-A17).

The evidence offered by the Commonwealth in support of its contention that Defendant shot Ronald Simone was limited. There was testimony offered as to the identification of the body, the transportation of the body from the scene, ballistics testimony, testimony that Defendant did not have a gun permit in Philadelphia, and similar technical evidence. The deceased's girlfriend, Patricia Rao, testified that she knew Defendant to be the best friend of Ronald Simone, the deceased, and that less than a half hour before the shooting she had received a phone call from Defendant who was angry, and who told her to give a message to Ronnie. Defendant told her that Ronnie had gone into Defendant's garage and taken a car without his permission, and that Ronnie better get in touch with him or he would put him in the hospital. About twenty minutes later, she received a call to go to the hospital (N.T. 1.29-1.44).

However, the most damaging testimony against Defendant was the testimony of a 13 year old eyewitness, Andre Waddell, who said he saw Defendant sitting in a car in front of Ron Simone's garage, and he heard Defendant threaten to shoot Ron, he heard three shots coming from the passenger side of the car where defendant had been sitting (N.T. 1.83-1.89). When the prosecution had called the witness to the stand, the defense objected on the grounds that his name had not been provided as requested. The Court ordered the trial to proceed (R. 37a-42). That objection was renewed (R. 43a-45a). The defense again renewed the objection, contending that the Commonwealth had a continuing

duty to disclose the existence of an eyewitness (R. 46a-55a). During cross-examination, the witness testified that the shooter did not have facial hair, and that his testimony about a missing finger had been suggested to him by the District Attorney (R. 56a-60a). At that point, defense counsel asked for any exculpatory evidence which would contradict the testimony by that witness, specifically, any statement which would indicate that the shooter did have facial hair. The prosecutor answered that there were no such statements (R. 60a-61a). It was conceded that the Defendant was clean shaven at the time of the incident.

After the Commonwealth rested, the defense presented a photographer and an investigator. The defense also called the original eyewitness who had pleaded the Fifth Amendment at the preliminary hearing, Mr. Joseph DiFillippo. He testified that the original statement he had given identifying Defendent as the shooter had been mistaken, since he did not know what the defendant actually looked like, having only met him once before. When he saw him in the Courtroom, he realized that he had identified the wrong man. In response to a question by the Court, the witness stated that the person whom he observed doing the shooting had a moustache (R. 69a-82a).

On the fifth trial day, which commenced with an afternoon session, the prosecutor disclosed to the defense for the first time that there had been another eyewitness to the incident. Mr. Murray provided the defense with a four page statement taken at 11:00 that morning from James Melino,[2] and arranged to have Mr. Melino brought to the Courtroom. He advised the defense that this was the only statement that he had, although the prosecutor stated to the Court that the day before he had discussed the matter with Detective Paris

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2. His name was spelled both "Melino" and "Merlino" in the Notes of trial and post-trial proceedings.

and that Detective Paris had recalled that there was a person in a gas station at the corner of Washington Avenue and 13th Street from whom he thought they had obtained a statement. However, the prosecutor stated that Detective Paris found no interview record and, therefore, the prosecutor sent Detective Paris and a detective from the District Attorney's Office to the scene to locate this witness and to bring him to court (R. 102a-104a). The witness was then called by the defense, and testified that he heard what sounded like shots or firecrackers and that he thereafter saw a car. He observed the passenger in the car, and saw that that the passenger had a moustache. He was questioned after the incident, and he told the police that the passenger had a moustache (R. 104a-113a).[3] On cross-examination by the prosecution, Melino indicated that he did not see the car for about a minute and a half after the shooting, and that it drove away slowly until it got to Washington Avenue, where it sped off (R. 114a-128). Based on this latter testimony, the prosecutor later argued in his closing speech that the car observed by this witness was not the car from which the shots were fired and that the person in the passenger seat with the moustache was therefore not the person who fired the shots.

Other defense testimony was offered, including testimony of Mr. DiFillippo's attorney who had spoken to Mr. Murray a few days before the scheduled commencement of trial, and had discussed the fact that his client had recanted and testified that Defendant was not the person he had seen (R. 84a-101a). There was also testimony from a young lady named Michele Young who lived across the street from the garage, who heard the shots, looked out, but never saw Andre Waddell (N.T. 5.63-5.87). The defense rested, the defense renewed its

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3. At the post-verdict hearing he identified a written statement he had given to the police on the date of the incident, even though they had said they had found no such statement.

Motion to Suppress the testimony of Andre Waddell, which motion was denied (R. 130a), closing arguments were made, and the Court rendered its verdict of guilty on all charges but carrying firearms (R. 155a-157a). Bail was immediately revoked.

Following the conviction, the defense filed post-trial motions for a new trial and arrest of judgment, and a brief and supplemental brief, all before the Notes of Testimony had been transcribed. Before argument was scheduled, trial counsel sought leave to withdraw, which was granted, and new counsel entered his appearance, was given leave to file additional supplemental reasons and briefs after the Notes of Testimony had been transcribed.

As previously noted, testimony in support of those post-trial motions was taken over four separate days[4] additional briefs were submitted, argument was presented to the Court, and on January 15, 1980, the motions were denied and sentence was imposed. A timely appeal was filed and eight months later the trial judge filed an opinion in support of his decision (Appendix B, *infra*, pages A9-A17).

At the post-verdict hearings the Defendant offered the testimony of Mr. Melino to show that he had been interviewed on the day of the incident by police officers, and had given a statement in which he had identified the passenger as having facial hair. He also testified that he was not thereafter interviewed about the case until the day he was called to testify at the trial on December 8, 1978. At that time he was not shown his prior statement, but if he had been shown that statement, some of his testimony at the trial might have been different, since the statement he had given on the day of the incident represented a clear recollection of the facts. Mr.

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4. All of the testimony taken at the post-verdict motions was included in the Reproduced Record printed and filed in the Supreme Court of Pennsylvania.

Simone testified that he never filed discovery motions after he was advised by Mr. Murray's letter on June 27, 1978, that the Commonwealth would not provide certain information, because he had been told that this was a "one witness case" (meaning only one eyewitness, namely, DiFillippo) (R. 214a). He therefore felt that the only issue was a legal one as to whether Mr. DiFillippo's statement would be admissible in evidence. It was because of this that he advised his client to waive a jury. He also did not ask for a hearing on the names and addresses on other witnesses because Mr. Murray had said there were no other witnesses (R. 127a). He testified that if he had known of the existence of Melino and Waddell he would have attempted to interview them and conduct other investigation, and would certainly have not have recommended waiver of a jury, since it would have led him to believe that there was an issue of fact. The Commonwealth offered the testimony of Detective Paris to explain why the Melino statement was not presented to the defense, and why the existence of Melino was not disclosed to the defense until the trial had started. He also testified why the prosecution did not advise the defense of the existence of the alleged eyewitness Andre Waddell or give a copy of the Waddell statement to the defense. Mr. Murray was permitted to testify over objection, since he had not been sequestered in accordance with the Court Order and despite defense counsel's specific request that he be sequestered (R. 178a-180a, 313a-318a). Mr. Murray disputed Mr. Simone's version of what had occurred in their discussions concerning the existence of more than one witness and he also attempted to explain why the two statements were not disclosed to defense counsel. Mr. Melino was again recalled to deny that he had been reinterviewed by Mr. Paris on the day of the incident, and Mr. Simone was recalled to refute some of Detective Paris' statements or innuendos.

On the issues raised in this Court, Judge Malmed, in his Opinion justifying his denial of the post-trial motions, concluded that the Defendant's trial counsel had been clearly notified by the Commonwealth that it would not supply the names and addresses of eyewitnesses, and that trial counsel should therefore have taken additional steps, such as filing a motion, to obtain such information. Accordingly, Judge Malmed concluded, that there was no error in permitting the witness to testify at the trial.[5] The Court also concluded that Melino was neither a witness or an eyewitness to the occurrence, because the car he saw could not have been the one from which the shots were fired, and therefore there was no *Brady* violation. Furthermore, the Court concluded that trial counsel was not ineffective for not seeking the identity of eyewitnesses, since Melino was not an eyewitness, and Wadell did not participate in pre-trial identification proceedings[6] and that the Commonwealth properly feared for the safety of the witness.[7] Finally, the Court concluded that the waiver of jury was valid, because Defendant never mentioned in the colloquy nor did he testify at the post-verdict motions that he had been misled as to the existence of an eyewitness.[8]

On these issues, the Supreme Court of Pennsylvania took a different tack. It concluded that there was no

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5. It should be noted that the Court did not address the constitutional issue raised, nor did it consider counsel's failure to file the motion as an example of ineffective assistance of counsel.

6. Apparently the Court relied only upon paragraph B(1) (d) of Rule 305, not paragraph B(2) (a).See page 4, *supra*.

7. Thus apparently the Court interpreted the Rule as permitting the Commonwealth to make this decision, rather than requiring them to seek a protective order from the Court, as required by Rule 305 F.

8. This ignored the fact that at the time of the colloquy he did not know of the existence of the eyewitness, and that the Defendant did not testify at the post-verdict proceedings, but that his counsel did, and that counsel testified that knowledge of the eyewitness would have led him to advise his client to reject the waiver.

violation of *Brady* because the identity of the witness Melino was provided by the prosecutor and he was called as a defense witness.[9] The Court also concluded that although the prosecution had withheld the name and identity of Waddell, it did so to protect the witness. The Court concluded that the Pennsylvania Rule imposing a continuing duty to disclose additionally discovered evidence permits the trial court discretion to permit the witness to testify despite the prosecutor's failure to disclose that witness. The Supreme Court said there was no *Brady* violation as to this witness because his testimony was not exculpatory.[10] In a footnote the Court noted that the prosecution should not make an *ex parte* determination of what witnesses it plans to disclose or not disclose, but should advise the Court; however, it concluded, without citing any authority, that there was no prejudice caused to the Defendant, because the defense failed to ask for a continuance or take other reasonable remedial steps. At the same time the Court concluded that trial counsel had not been ineffective for failure to make pretrial motions for discovery of identity and statements; nor for failing to request a continuance when the witnesses were produced at trial; nor for failing to take other steps during trial. As to the waiver of jury trial, the Supreme Court concluded that there was no apparent unfairness in the bench trial — thus ignoring the question of whether the waiver of jury trial was knowingly and voluntarily obtained.

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9. This ignored the fact that it was not provided until after the prosecution had rested and defense was almost complete.

10. It should be noted that counsel had not argued a *Brady* violation, but that the Court's interpretation of the Rules had violated *Wardius v. Oregon*.

REASONS FOR GRANTING THE WRIT

I. The Commonwealth's Failure to Disclose Favorable Evidence, the Existence of an Eyewitness Who Contradicted the Commonwealth's Case, Until the Trial Was Almost Concluded, Violated *Brady v. Maryland.*

It was not until the fifth day of trial, after the prosecution had rested and the defense was almost complete, that the prosecution finally disclosed that it had located a witness who had been interviewed on the day of the incident, and who had seen a passenger in a car pulling away from the scene of the shooting. He said that passenger had a mustache; it was agreed that the defendant had been clean shaven at the time of the incident. Thus, the testimony of that witness would tend to exculpate the defendant, since the only witness to the shooting said that the shooter was clean shaven.

Ever since this Court decided *Brady v. Maryland*, 373 U.S. 83 (1963), it has been clear that a defendant is denied a constitutional right to a fair trial if the prosecution withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty. As noted by the Court:

> "The principal of Mooney v. Holohan [294 U.S. 103 (1935)] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when the criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

Also, see *Napue v. Illinois*, 360 U.S. 264 (1959); *Moore v. Illinois*, 408 U.S. 786 (1972); *Giglio v. United States*, 405 U.S. 150 (1972). In *United States v. Agurs*, 427 U.S. 97, 104 (1976), this Court distinguished three situations in which *Brady* would apply; the first, where the prosecutor's case includes perjured testimony; the second where there has been a pre-trial request for spe-

cific evidence; and the third where there is a general request for "all *Brady* material or for "anything exculpatory". This was discussed and applied in *Commonwealth v. Rose*, 483 Pa. 382, 396 A.2d 1221 (1978). In that case, the Pennslyvania Court held that the failure of the prosecution to disclose to the defense in advance of trial that a Commonwealth witness had undergone psychiatric treatment due to the injury which he had received from being shot by the defendant was not a violation of *Brady* or *Agurs*, since the defendant had not demonstrated how, under the circumstances of that case, pre-trial knowledge of this matter would have aided the defense in demonstrating the witness' credibility with the jury, particularly since disclosure was made at trial and the evidence was effectively presented to the jury. In the case at bar, however, the failure to disclose the existence of this witness in advance of trial prevented the defense from investigating all of the circumstances surrounding the witness' observation of the shooting and learning of the existence of prior statements given by this witness. Furthermore, failure to disclose this prevented the defense from making an intelligent and knowing decision on whether or not to waive a jury trial.

Cases interpreting *Brady* have ruled that if material in the possession of the prosecution is withheld, it is error whether or not that is done intentionally; bad faith of the prosecuting attorney is not necessary. See *Commonwealth v. Hallowell*, 477 Pa. 232, 383 A.2d 909 (1978) (where the promises of leniency by one Assistant District Attorney were attributed to the office even though the trial assistant was not aware of them); *Commonwealth v. Jenkins*, 476 Pa. 467, 383 A.2d 195 (1978) (Court concluded that even if it assumed that non-disclosure of statement was unintentional, it affected the fairness of the trial); *cf. United States v. Disston*, 582 F.2d 1108 (7th Cir. 1978) (citing *Brady*, which specifically stated that suppression of evidence favorable to the accused violates due process irrespective of the good

faith or bad faith of the prosecution). Also see *Lewis v. Court of Common Pleas of Lebanon County*, 436 Pa. 296, 260 A.2d 184 (1969) (holding that the District Attorney may not deny defense counsel access to the Commonwealth's witnesses); *Commonwealth v. Miller*, 203 Pa. Super. 511, 201 A.2d 256 (1964) (prosecutors suppressed reports of State Police Lab showing important differences in twine, and argued that they were similar.)

In addition, the withholding of favorable evidence by any law enforcement official is sufficient to constitute a violation, it need not be by the prosecuting attorney himself. This has been clearly established in a series of federal cases: see *e.g.*, *United States v. Scruggs*, 538 F.2d 238 (5th Cir. 1978); *United States v. James*, 495 F.2d 434 (5th Cir. 1974); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). A similar conclusion has been reached by the Supreme Court of Pennsylvania: *Commonwealth v. Wilder*, 461 Pa. 597, 337 A.2d 464 (1975) where the police refused to arrange for a one-on-one confrontation between the accused and the dying victim at the hospital, even though the victim was mentally and physically able to cooperate. Also see *Commonwealth v. Smith*, 417 Pa. 321, 208 A.2d 219 (1965) (where the Court required disclosure of documents in possession of federal authorities).

Brady and its progeny point out that failure of the prosecution to disclose exculpatory evidence violates the due process of the defendant, in that it prevents him from obtaining a fair trial. The Pennsylvania Rules of Discovery in criminal cases go further than requiring disclosure of exculpatory evidence: there is *mandatory* requirement of additional evidence, and *discretionary* disclosure of other. See Pa.R.Crim.P. 305. Under the Rules the Commonwealth must disclose, on request by the defendant, evidence of certain classes provided they are material to the case; it is discretionary for the Court to order disclosure of evidence upon a showing that is

material to the defense and that the request is reasonable. In the case at bar, Mr. Melino was not only an eyewitness, the disclosure of whose identity would therefore be discretionary with the Court, but the evidence that he had given in his statement to the investigator on the scene — namely, that the shooter had a moustache — tended to exculpate the defendant, who was clean shaven. Thus, non-disclosure of this witness and his statement would seem to violate the *Brady* principles *and* the *mandatory* provisions of Rule 305. At the very least, however, this Court owes a duty to decide whether the prosecutor intentionally withheld this information, and whether it was material to the defense, and failure to disclose it was prejudicial. See *Commonwealth v. Chapman*, 255 Pa. Super. 265, 386 A.2d 994 (1978); *Commonwealth v. Powell*, 449 Pa. 126, 295 A.2d 295 (1972); *cf. Commonwealth v. Jones*, 438 Pa. 86, 263 A.2d 360 (1970). Also see *Commonwealth v. Gamsby*, 239 Pa. Super. 566, 360 A.2d 741 (1976); *United States v. Dansker*, 565 F.2d 1262 (3rd Cir. 1977); *United States v. Disston, supra.*

The relevant cases emphasized the fairness of the trail, rather than the culpability of the prosecutor, and also whether there has been a corruption of the truth-seeking function of the trial process. See *Mooney v. Holohan,* 294 U.S. 103 (1934); *United States v. Agurs, supra,* 427 U.S., at 104. Also see *Clark v. Blackburn,* 632 F.2d 531 (5th Cir. 1980); *Freeman v. Georgia,* 599 F.2d 65 (5th Cir. 1979); *United States v. Fischel,* 686 F.2d 1082, 1093, n.13 (5th Cir. 1982).

The above cases clearly demonstrate that it is the Commonwealth's duty to supply the defense with any information which could be considered helpful to the defense. Material may not be withheld by the prosecution, whether or not done intentionally and whether or not done in bad faith.

Here, it was admitted by the detective that he had the statement and he intentionally left it out of the

binder because *he* did not consider it relevant. It will be a sad day for the administration of justice when a police officer can determine, *ex parte* and without judicial review, what is to be considered relevant and necessary disclosure to the defense. The detective did not seek the advice of the Court; he did not even seek the advice of the attorney for the Commonwealth, the prosecutor. To permit the police officer to make this decision is to make a mockery of *Brady* and other appropriate decisions of this Court.

Furthermore, the Pennsylvania Rules make disclosure of this information mandatory, not discretionary. Pa.R.Crim.P. 305B(1)(a) requires that in all court cases, *on request by the defendant*, the Commonwealth shall disclose to the defendant's attorney all evidence favorable to the accused which is material either to guilt or to punishment. This does not require a motion, as is required under the discretionary provisions of that Rule. Pa.R.Crim.P. 305B(2). There can be no question but that Melino's testimony, that the passenger in the car he observed pulling away from the scene of the shooting had a moustache, was material and tended to exculpate the defendant, since it was admitted that the defendant was clean shaven.

There is no doubt the testimony at the post-trial motions showed that failure to disclose this information seriously affected and impaired the defense in several respects. Mr. Simone testified that if he had known of the existence of Mr. Melino and of his exculpatory testimony, he would have been able to interview him better, so as to be better prepared for his testimony at the trial. He would not have recommended to the defendant to waive a jury because it would have been obvious that there was a factual dispute. It would have affected his decision on putting the defendant on the stand (R. 217a-220a), and he might not have called Mr. DeFillippo as a witness, since his testimony was weakened by his recanting (R. 257a-258a).

The Trial Court never directly addressed this question. It seems to have combined and confused two separate issues raised by the post-verdict motions: (1) the withholding until the end of the trial, when accidentally discovered by defense counsel's question, of the existence of evidence favorable to defendant (the existence of Melino whose testimony contradicted the Commonwealth's evidence and thus was exculpatory), thus violating *Brady;* and (2) failing to produce in advance of trial statements of eyewitnesses (Waddell and Melino), thus violating the Rules of Criminal Procedure.

The Supreme Court's interpretation of its own Rule in the circumstances of this case in effect makes the application of *Brady* depend upon the whim of the prosecutor and the hindsight of the trial Judge. The Supreme Court said that the disclosure of the existence during the trial, after the prosecution had rested and when the defense was almost over, meets the requirements of *Brady*. This ignores the fact that the withholding of the information until that late date prevented the defense from making an intelligent decision as to strategy, including the knowing and intelligent waiver of the constitutional right to jury trial. It also ignores the fact that the prosecution never produced the statement which had been given by the witness Melino on the date of the incident, and which would have changed his testimony at the trial, according to that witness's testimony, during post-trial hearings. The Supreme Court relegates to a footnote its conclusion that the prosecution does not violate the discovery rules (and implicitly does not violate *Brady*) when it fails to provide the defense with evidence of which it was unaware, even though it was in police custody.[11] This ignores the teachings of this

11. This ignores the fact that the detective's explanation of the unimportance of the statements was incredible. He included in his reports statements of persons who said they knew nothing about the case, but claimed that he did not include Melino's statement because he did not believe that the car Melino saw was the murder car. It is obvious that this is not a decision for him to make.

Court in *Moore v. Illinois*, 408 U.S. 786 (1972), particularly at 810 (Marshall, dissenting); *Smith v. Phillips*, 455 U.S. 209 (1982); and *United States v. Agurs, supra.*

Thus, the interpretation of the Pennsylvania Rules by the Trial Court and by the Supreme Court of Pennsylvania, to permit the prosecutor on an *ex parte* basis without prior approval of the Trial Court, to withhold from the defense the existence and identity of an eyewitness to the crime and to refrain from producing for the defense a pre-trial statement given by that witness, amounts to a violation of *Brady v. Maryland.*

II. The Pennsylvania Court's Interpretation of Its Discovery Rule, To Permit The Prosecutor To Refuse Pre-Trial Disclosure of The Existence of Eyewitnesses, Violates *Wardius v. Oregon* and Deprives Petitioner of Due Process.

When this Court sounded the death knell for notice of alibi rules, such as the Pennsylvania Rule in effect at that time, it did so specifically because the Oregon Statute in question in that case did not provide for reciprocal discovery. *Wardius v. Oregon*, 412 U.S. 470, 472 (1973). However, this Court went further and noted that such Rules are "based on the proposition that the ends of justice will best be served by a system of liberal discovery which give both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." *Id.*, at 473. The Court pointed out that the adversary system of trial is not an end in itself, and that there is ample room in that system, as far as due process is concerned, for a rule designed to enhance the search for truth in a criminal trial by ensuring both the defendant and the state ample opportunity to investigate facts crucial to the determination of guilt or innocence. *Id.*, at 474. In another context, the Supreme Court of Pennsylvania noted that changes in federal and state Rules of Criminal Procedure reflect a growing concern that gamesmanship too

often may govern the conduct of criminal proceedings, resulting in a general obfuscation of issues. The Court cited the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Discovery and Procedure before Trial, as well as this Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), to encourage the fair use of full disclosure of facts. *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 393 A.2d 306 (1978).

In the case at bar, on June 20, 1978, only a few days after defendant's arraignment, and many months before the trial, defense counsel wrote and requested discovery under Rule 305 (R. 158a-159a). Seven days later, the prosecutor answered, agreeing to supply some information but specifically denying the requests relating to eyewitness statements and names and statements of others (R. 160a). No pre-trial motion for discovery was filed by the defense. At the trial, when the prosecution attempted to introduce testimony relating to technical evidence, and also testimony of eyewitnesses, the defense objected because of failure of the Commonwealth to disclose the existence of those technical reports and of the eyewitnesses. See, e.g., N.T. 1.43 *et seq.*; R. 31a *et seq.*; R. 38a *et seq.*; R. 102a *et seq*. First, the prosecutor stated that he would provide any reports which defense counsel wanted, but defense counsel never got back to him. (R. 30a). Later, the prosecutor said that he had forgotten about discovery in the case. (R 34a). Still later, he stated that he had refused in his letter to supply the information and since no motion was filed, he would not supply it. (R. 38a *et seq.*).

Defense counsel stated that the reason he had filed no discovery motion is because he had been misled by the prosecutor into believing that the only eyewitness was the one who had testified at the preliminary hearing and who had recanted. (R. 39a *et seq.*) He repeated this reason under oath at the post-trial hearing (R. 214a-219a; 252a-254a).

Whether or not the prosecution knew in June, 1978 (when the discovery letter was written) of the existence of Andre Waddell[12] and of James Melino,[13] it is apparent that the prosecution knew of the existence of these two eyewitnesses in advance of the trial. As already noted, they learned of Melino's existence the day of the shooting, and there is evidence that he gave police a statement approximately a half hour later. They learned of the existence of Andre Waddell when he came in with his mother, which was some months before the trial; his statement was dated September 9, 1978. The prosecution certainly learned of their existence of mid-September, when Detective Paris prepared his report and put the homicide binders together (R. 298a-299a). In the first argument, *supra*, we have already discussed the intentional withholding of the Melino statement and the non-disclosure of Melino as an eyewitness. Detective Paris admitted that he deliberately did not put Waddell's statement in the homicide binder so that nobody would know of its existence (R. 300a *et seq.*; 304a-306a). He admitted that the prosecutor, Mr. Murray, knew of Waddell's statement, since he was there when the boy was interviewed (R. 305a). However, he did intend to keep it from the Judge as well as defense counsel (R. 305a-306a). Under Rule 305D, there was a continuing duty on the Commonwealth to disclose the existence of these eyewitnesses. Pa.R.Crim.P. 305D.

Rule 305D provides:

> "If prior to or during trial, either party discovers additional evidence or material *previously requested* or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the *identity*

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12. Who the Commonwealth admits was an eyewitness to the shooting.

13. Who the prosecution seems to suggest was not an eyewitness to the shooting, but merely a witness to collateral events.

of an additional witness or witnesses, such party shall promptly notify the opposing party *or the court* of the additional evidence material or witness." Pa.R.Crim.P. 305D. (Emphasis supplied.).

No cases have been found in Pennsylvania interpreting this rule, which did not become effective until January 1, 1978. However, it is obvious both from a careful reading of the Rule, and an analysis of the purpose for the liberalized discovery, as set forth in *Wardius* and *Lepley, supra,* that the continuing duty applies whether or not there has been filed a motion for discovery. The words "previously requested" would be superfluous if a motion were necessary to trigger this rule. Furthermore, if it were necessary for a motion to be filed to trigger the rule, then every defense counsel would be required to file such a motion in every case, even though the Commonwealth has made its entire file available to the defense at the time of the informal discovery hearing. This would be an absurd and overly technical result which would run entirely counter to the policy of liberal discovery.

One of the alternatives set forth in the Rule, is that the parties should promptly notify the opposing party *or the Court* of the additional evidence, material, or witness. It is clear that at no time did the prosecutor ask the Court to make an *in camera* determination as to whether the existence of these witnesses or of either of them should have been disclosed to the defense, as required by Rule 305 D. Here the detective and the District Attorney arbitrarily decided to bypass the Judge, as well as the defense counsel, and to make their own decision that the existence of this witness should not be disclosed. They allegedly did this because of fear for the safety of the witness. However, they admitted that a thorough investigation was made and neither the defendant nor anyone else was arrested or charged with threatening witnesses, obstruction of justice, or any other charge could be answered in a Courtroom (R. 359a-360a).

Again, to permit the prosecutor to make unilateral and *ex parte* decisions as to what to disclose, would be to make a mockery of the judicial decisions dealing with discovery.

The Trial Court concluded only that "Melino never observed anything of relevance to the case" (App. B, *infra*, page A-11), and that ". . . the Commonwealth was not guilty of any impropriety as to Waddell" (App. B, *infra*, page A-12), primarily because counsel had not sought pre-trial discovery after the Commonwealth's letter of June 27, 1978 informed him ". . . in clear-cut fashion that the Commonwealth resisted supplying the names and address of eyewitness" (App. B, *infra*, page A-10). Such facile generalizations do not answer the grave constitutional issues and questions of interpretation of Rules presented in this case. It does not discuss the duty of the prosecutor to disclose such material to the Court for its judicial and impartial determination of whether it should be disclosed under appropriate judicially-fashioned safeguards. It permits the prosecutor to be the *ex parte* and final arbiter of his own constitutional duties of fairness — a constitutionally intolerable result.

The Supreme Court confused both arguments. As to the witness Melino, the Court addressed only the *Brady* issue (see App. A, *infra*, page A-3). As to Waddell the Court ruled that it was not a *Brady* violation, even though counsel had never argued that it was. As to the continuing duty of the prosecutor to disclose the existence of eyewitnesses, the Supreme Court said that the trial court was correct in concluding that the Commonwealth had feared for the safety of the young witness.[14] As to the continuing duty, the Court also ruled that orders compelling discovery are left to the discretion of the

14. The Supreme Court said that the trial court had addressed this at the trial. However, the trial court never made any ruling until post-verdict motions, and then only referred to DiFillipo's recantation of his identification of the Defendant, and stated "it cannot be said that the Commonwealth's precautions as to Waddell were un-

trial court, and that the trial court's decision allowing Waddell to testify was not inconsistent with the rule. Such a reading of the Rule, as applied to the case at bar, represents a distortion of the concept of discovery established in *Wardius*. The Supreme Court also suggested that the trial Judge obviated any injury by offering full continuance to defendant to prepare or investigate any difficulty caused by late disclosure.[15] Such distortion of the Rule again leads to an evasion of the *Wardius* doctrine.

Although there is no general constitutional right to discovery in a criminal case, *Weatherford v. Bussey*, 429 U.S. 545 (1977), the due process clause does speak to the balance of forces between the accused and his accusor. See *Wardius v. Oregon, supra*. Thus, the right to discovery in criminal cases has been established by federal and state rules of criminal procedure. In *United States v. Bouye*, 688 F.2d 471 (7th Cir. 1982), the Court found that discovery of notice of alibi under the Federal Rules is a prosecution-triggered device, and held that the Government was under no obligation to disclose the identity of its witnesses unless the Government requested notice of alibi. Pa. Rule 305 is a defense-triggered statute, which was triggered here by a defense request. By allowing Waddell's testimony without pre-trial disclosure, the trial court endorsed the prosecution's withholding not only of the identity of its witness, but of his existence. Since the prosecution decided *ex parte* to withhold the evidence, the defense had no opportunity to challenge non-disclosure. The rationale for non-disclosure, the protection of Waddell, is only valid if there is

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necessary." There was no evidence that Defendant or anyone on his behalf had procured DiFillipo's recantation, or that there were any threats communicated to any witness, directly or indirectly.

15. Despite the fact that the Supreme Court said that the offer was refused and no request for delay or mistrial was made, the Supreme Court refused to find ineffective assistance of counsel in such refusal.

a specific showing of need for concealment which outweighs the need for disclosure. See *United States v. Cannone*, 528 F.2d 296 (2nd Cir. 1975). In *United States v. Fischel*, 686 F.2d 1082, 1092 (5th Cir. 1982), the Court said "the Government must suggest [reasons for non-disclosure] to the Court." The Defendant must also show that non-disclosure was prejudicial. See *United States v. Valenzuela-Bernal*, 73 L.ed.2d 1193 (S.C.U.S. 1982); *United States v. Fischel, supra*, at 1093. Here the prejudice was apparent. In the case at bar, concealment of the existence of the eyewitness at least prevented a knowing and intelligent decision on waiver of jury. See *United States v. Padrone*, 406 F.2d 560 (2nd Cir. 1969); *United States v. Roybal*, 566 F.2d 1109 (9th Cir. 1978); *Commonwealth v. Jenkins*, 476 Pa. 467, 383 A.2d 19 (1978); *Commonwealth v. Johnston*, 258 Pa. Super. 429, 392 A.2d 869 (1978).

For all the foregoing reasons, it is respectfully submitted that the Court's interpretation of the Pennsylvania Rules of Criminal Procedure to permit the Commonwealth's improper withholding of information as to the existence of eyewitnesses prejudiced the Defendant's Constitutional rights.

III. The Prosecution's Failure to Disclose The Existence of Eyewitnesses Deprived Petitioner of a Knowing Waiver of His Jury Trial.

The trial court concluded that in the waiver colloquy the Defendant had sworn that he was freely and voluntarily making his own decision, and that he had not received any promises or threats to induce him to waive. Of course, this ignores the fact that at the time of the colloquy, neither counsel nor Defendant knew of the existence of eyewitnesses. The Court went on to conclude that a full opportunity had been accorded to the Defend-

ant enabling him to testify during post-trial evidentiary hearings, but he never testified that he was misled or deceived by counsel. Again, this ignores the testimony of trial counsel that if he had known of the existence of eyewitnesses, he would have recommended against the waiver. The Supreme Court, on the other hand, concluded that the Commonwealth never denied the existence of an eyewitness, so that counsel could not have been misled into recommending waiver of jury trial. Furthermore, the Court concluded, unless there is an error of law, bias or prejudice there is no inherent unfairness in a bench trial as contrasted to a trial by jury.

This ignores the basic issue of whether Defendant has made a knowing and intelligent waiver of his constitutional right to a jury trial — which is entirely separate and apart from the question of whether he had a fair bench trial.

There is a strong presumption against the waiver of constitutional rights. *Brookhart v. Janis*, 384 U.S. 2 (1966). Such a waiver must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742 (1970) (guilty plea). In *Patton v. United States*, 281 U.S. 276 (1930), this Court said:

> "Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses . . . And the duty of the trial court [to guard against an improper waiver] is not to be discharged as a mere matter of rote, but . . . with a caution increasing in degree as the offenses dealt with increase in gravity." 281 U.S., at 312-313.

See also, Gannett Co. v. DePasquale, 443 U.S. 368 (1979). "The question in each case is whether the accused was competent to exercise an intelligent, informed judgment — and for determination of this question it is of course relevant whether he had the advice of

counsel." *Adams v. United States ex rel McCann*, 317 U.S. 269, 277 (1942). *Tollett v. Henderson*, 411 U.S. 258 (1972), discussing counsel's role in the decision to plead guilty, uses language that also applies to the waiver of a jury trial:

> "The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." 411 U.S., at 268.

The decision to waive a jury trial is often based on such highly practical considerations as the number of witnesses, and the impressions those witnesses may create before a judge or a jury. In *United States v. Padrone*, 406 F.2d 560 (2d Cir. 1969), the court ordered a new trial, finding that defense strategy may have been determined by the prosecution's failure to comply with a discovery order. In *United States v. Roybal*, 566 F.2d 1109 (9th Cir. 1977), a new trial was ordered after the prosecution ignored a discovery order to disclose information it intended to bring out through its informant witness *Roybal* was distinguished in *United States v. Ramirez*, 608 F.2d 1261 (9th Cir. 1979). In *Ramirez*, the government disclosed evidence on the morning of trial, in violation of a disclosure order. The government stated that the evidence was not substantiated until the night before trial, and that its disclosure was as early as practicable. The court found *Roybal* not controlling:

> "In that case, the Government obtained evidence from an informant damaging to the defendant one month prior to trial but waited until the informant was on the stand before adducing it

> *without any prior warning* to the defendant. Moreover, the surprise testimony was the only direct evidence that defendant had trafficked in drugs, whereas, in the instant case, the threat allegations were peripheral and did not constitute the sole evidence of appellant's guilt. 608 F.2d at 1265 (emphasis in original).

This case is similar to *Roybal*. The Commonwealth knew of Waddell for months, but failed to disclose his existence until trial; in addition, Waddell's testimony was the only direct evidence linking the defendant to the crime scene.

IV. The Conduct of Defense Counsel in This Case Deprived Petitioner of Effective Assistance of Counsel

A. The Decisions of the Various Courts of Appeals and Highest Courts of the States Concerning the Standard to Be Used in Determining Whether a Defendant in a Criminal Case Has Been Denied the Effective Assistance of Counsel Guaranteed Him by the Sixth and Fourteenth Amendments Are So Confused and Contradictory as to Require This Court to Review This Case and Promulgate a Clear Interpretation of This Important Constitutional Guaranty.

The Pennsylvania courts have adopted a standard for determining whether representation by counsel measures up to the constitutional requirements of the Fourteenth Amendment, which incorporate the provisions of the Sixth Amendment. As enunciated in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 604, 235 A.2d 349, 352 (1967), the standard applied by the Pennsylvania courts is:

> "(C)ounsel's assistance is deemed constitutionally effective once we are able to conclude that the principal course chosen had *some reasonable basis*

designed to effectuate his client's interests." (Emphasis supplied.)

Also see *Commonwealth v. Nole*, 461 Pa. 314, 316 A.2d 302 (1975); *Commonwealth v. Goosby*, 461 Pa. 229, 336 A.2d 260 (1975); *Commonwealth v. Rice*, 456 Pa. 90, 318 A.2d 705 (1974); *Commonwealth v. Harrison*, 228 Pa. Super. 42, 323 A.2d 848 (1974). However, this standard differs from that established in other state and federal courts.

The Federal courts have articulated the Sixth Amendment requirements under a variety of phrases. The legal standard for ascertaining whether a defendant has been denied the constitutionally guaranteed right to effective assistance of counsel is enunciated, in several Circuits, as an inquiry of whether counsel's representation is such as to shock the conscience of the court, and to make the trial a farce and mockery of justice. See *United States v. Bubar*, 567 F.2d 192 (2nd Cir.) cert. denied, 434 U.S. 872 (1977); *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1975); *United States v. Wright*, 573 F.2d 681 (1st Cir.), cert. denied, 436 U.S. 949 (1978); *United States v. Ramirez*, 535 F.2d 125, 129 (1st Cir. 1976). The same standard, articulated somewhat differently by the Tenth Circuit, is whether counsel's representation is perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference or preparation. *United States v. Riebald*, 557 F.2d 697 (10th Cir.) cert. denied, 434 U.S. 860 (1977); *Gillihan v. Rodriguez*, 551 F.2d 1182, 1187 (10th Cir. 1977).

More than half of the Circuits, however, have expressly rejected this mockery of justice approach, some adopting a standard requiring counsel to be reasonably likely to render and rendering reasonably effective assistance. See *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *United States v. Fesell*, 531 F.2d 1275, 1278 (5th Cir. 1976); *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973); *Beasley v. United States*, 491

F.2d 687 (6th Cir. 1974). In *Beasley*, the court stated that:

> "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. . . ." Id., at 696.

The Eighth Circuit articulation is whether counsel exercised the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *Pinnell v. Cauthron*, 540 F.2d 938 (8th Cir. 1976); *United States v. Easter*, 539 F.2d 663, 665-666 (8th Cir. 1976).

The impetus for making a shift from the "subjective" mockery of justice standard to a more objective standard came from *McMann v. Richardson*, 397 U.S. 759 (1970) where this Court, in determining the validity of guilty pleas entered on the advice of counsel who erroneously thought that their confessions would be admissible, stated that a defendant is entitled to legal assistance "within the range of competency demanded of attorneys in criminal cases".

Following the *McMann* shift of philosophy calling for a more stringent and objective standard for determining effective assistance of counsel, several Circuits have expressed their own formulae. The Fourth Circuit, in *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978), adopted the *McMann* test and commented:

> "A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from negligence or ignorance rather than from informed, professional deliberation."

In the Third Circuit, the test for constitutional adequacy of legal services is whether counsel exercised the customary skill and knowledge which normally prevails at the time and place. *Boyer v. Patton*, 579 F.2d 284 (3rd

Cir. 1978); *Moore v. United States*, 432 F.2d 730 (3rd Cir. 1970). In the Seventh Circuit, the standard is "assistance which meets a minimum standard of professional representation." *United States ex rel. William v. Toomey*, 510 F.2d 635, 641 (7th Cir. 1975). The Ninth Circuit is internally divided. Compare *Saunders v. Eynans*, No. 75-3485 (9th Cir. April 18, 1977), with *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977).

This Court has failed to adopt or to approve any specific standard. The language of this Court in *McMann, supra*, in 1970, was not directed at a charge that counsel had been ineffective. On the contrary, the issue before the Court was whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions or proof that the plea was motivated by a prior coerced confession. In discussing the factors that enter a defendant's decision to a plea of guilty, the Court noted that a plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. The Court concluded that whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends initially, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. It was in that context that the Court stated: "On the one hand, uncertainly is inherent in predicting Court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel."

Just three years ago when the Court had an opportunity to resolve the issue of what minimum standard of competence must be displayed by an attorney for a criminal defendant in order to satisfy the Sixth Amendment's requirement of effective assistance of counsel, this Court denied certiorari, despite the vigorous dissent of

Justices White and Rehnquist. *Maryland v. Marzullo,* 435 U.S. 1011 (1978).

In the case at bar, this Court again has the opportunity of bringing order to the "disarray" left by the varying standards applied by the State Appellate Courts and the Federal Courts of Appeals, some of which are mentioned by Justices White and Rehnquist.

B. Under the Constitutional Standards for Determining Effective Assistance of Counsel Announced by the Majority of the Federal Court of Appeals, Petitioner is Entitled to a New Trial Because His Counsel Committed Serious Pre-Trial and Trial Errors.

First, trial counsel assumed that the only witness was the recanting eyewitness DiFillipo. When he requested from the prosecutor the existence and identities of any other eyewitness, and was refused by the prosecutor, he owed a duty to Petitioner to file a pre-trial discovery motion — particularly in a first degree murder case. Thus, even if he was misled, when the youthful eyewitness was "sprung" on him at trial, he owed a duty to request a continuance to investigate the background of that witness and to prepare adequately to cross-examine or refute that witness. Likewise, when at long last the prosecutor disclosed the existence of a witness with possible exculpatory evidence, who cast great doubt on the version of the youthful eyewitness, he owed a duty to request a continuance at that point to enable him to investigate this witnesses' story and to obtain corroboration, since this witness could cast a reasonable doubt on the guilt of Petitioner, or even lead to evidence of his innocence.

Furthermore, counsel testified that he never discussed with his client a waiver of a jury trial in light of potential conflicting factual testimony, since he did not expect that there would be any such conflicting factual testimony. More important, once the damaging testi-

mony was admitted, and it was apparent there was a factual issue, he never sought to withdraw the waiver of jury trial, nor even discussed that possibility with his client.

Finally, the record is devoid of any argument by counsel as to the degrees of murder possible under the evidence, which would have been appropriate in a jury trial, and should have been stressed even in a bench trial. The Trial Court's conclusion, that trial counsel is not ineffective where counsel does not pursue a meritless course of action, begs all of these questions presented. The Supreme Court's cavalier dismissal of these questions by saying that these were mere trial strategies ignores reality in the case at bar.

If the Pennsylvania Courts did, in fact, squarely meet and resolve against Petitioner his claim that he was denied the effective assistance of trial counsel, it seems clear that the trial court and the Supreme Court resolved this case improperly, without following standards promulgated by this Court, and there is no way in which Petitioner can have the appropriate standards applied to him, should this Court deny review.

Accordingly, only through the intervention of this Court, by reviewing this conviction, can there be guidance provided to the state courts as to the proper standard to be applied in determining whether a person charged with a serious crime has received effective assistance of counsel within the meaning of the Sixth and Fourteenth Amendments, and can a miscarriage of justice be prevented in this case.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to determine whether the Pennsylvania Courts have ignored or improperly interpreted the Sixth and Fourteenth Amendments and the cases interpreting those Amendments, and their requirements for a fair trial, with effective assistance of counsel.

Respectfully submitted:

STANFORD SHMUKLER, ESQUIRE
Attorney for Petitioner
SAMUEL A. BONACCURSO
April, 1983

APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA *vs.* SAMUEL BONACURSO,* *Appellant*	:	No. 80-3-406

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the JUDGMENTS of the COURT of COMMON PLEAS, TRIAL DIV., CRIMINAL SECTION - PHILADELPHIA COUNTY, be and the same are hereby AFFIRMED.

BY THE COURT:

Marlene F. Lachman, *Esq.*
Prothonotary

Dated: JANUARY 28, 1983

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* Counsel's FN; The Court misspelled Petitioner's name in the caption and text.

[J-309]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, *Appellee*	:	No. 80-3-406
vs	:	Appeal from the Judgements of Sentence imposed by the Court of Common Pleas of Philadelphia at Nos. 115 and 118 June Term, 1978.
SAMUEL BONACURSO, *Appellant*	:	Argued: October 26, 1982

OPINION

MR. JUSTICE McDERMOTT FILED: January 28, 1983

This is an appeal from the judgments of sentence imposed upon appellant, Samuel Bonacurso, by the Honorable Edwin S. Malmed of the Court of Common Pleas of Philadelphia County.

Following a non-jury trial on December 12, 1978, appellant was convicted of first degree murder and possession of an instrument of crime. Judge Malmed sentenced appellant to life imprisonment on the murder conviction and imposed a concurrent term of two and a half to five years imprisonment on the weapons offense. Appellant's trial counsel filed post-verdict motions, then withdrew in favor of appellant's present counsel, who filed additional allegations of error, including claims of ineffective assistance of counsel. All post-trial claims were denied by the trial court on May 21, 1980. This appeal followed and we now affirm.[1]

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1. Jurisdiction is vested in this Court pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, §1, 42 Pa.C.S.A. §722. This statute was amended subsequent to appellant's conviction, re-

Appellant contends that despite appropriate and timely requests he was denied the name and identity of a witness, James Melino, in violation of Pa.R.Crim.P. 305 and *Brady v. Maryland*, 373 U.S. 83 (1963).[2] From this he claims numerous injuries culminating in a denial of his right to a fair trial. It will serve no purpose to pursue in detail the perjoratives that would follow the intentional violation of Rule 305 because in the instant matter the prosecutor's actions were neither deliberate nor injurious. The simple truth is that the witness' identity was in fact provided by the prosecutor, and he was called to testify *as a witness for the appellant*. All that he could say was put before the learned trial judge with every opportunity that an unhurried and careful bench trial provides. Melino testified that he was working at a service station, attending a car that was a block and a half from the scene. He heard what he described as "firecrackers" and about a minute and a half later observed a slow moving car with two occupants, the one on the passenger side having facial hair. Other Commonwealth witnesses, described appellant as clean shaven at all relevant times and occupying the front passenger side of a maroon Pacer. Hence, the appellant not only was provided a defense witness but, he used Melino's testimony to his advantage in contradicting other Commonwealth witnesses. Thus, appellant fails to demonstrate that his defense was prejudiced by the Commonwealth's alleged withholding of Melino's identity. This is fatal to his claim of error under *Brady*. *See Commonwealth v. Stetler*, 494 Pa. 551, 431 A.2d 992 (1981); *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977).

Appellant in a similar vein contends he was likewise denied the name and identity of a Commonwealth eye-

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moving this Court's exclusive jurisdiction over appeals from homicide convictions. Act of September 23, 1980, P.L. 686, No. 137, §1.

2. *Brady* established that suppression by the prosecution of evidence favorable to an accused constitutes a violation of due process. *Brady*, 373 U.S. 83 (1963).

witness, Andre Waddell. Although the prosecution did in fact withhold the name and identity of Waddell, a 14 year old boy, unlike Melino, whose name was not so much withheld as misplaced in a file handling,[3] the Commonwealth was attempting to protect its youthful witness. The Commonwealth maintained that it refused to reveal the identity, but not the existence of Waddell because the youth was reluctant to testify and both he and his mother were fearful of repercussions; a concern apparently not unfounded in the history of this case.[4]

Appellant's reliance on Rule 305(D) in support of his challenge to Waddell's testimony is misplaced. This rule (providing that either party in a criminal proceeding has a continuing duty to disclose additionally discovered

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3. The prosecutor was not aware of the existence of Melino's statements in time to provide them to the defense during pre-trial discovery because the detective who handled the investigation did not include them in the binder of investigative materials submitted to the District Attorney's office before trial. *See* Notes of Testimony on Post Trial Motions, Vol. III at 3.41. The detective considered the statements to be unimportant. *See* Notes of Testimony on Post Trial Motions, Vol. III at 3.43.

Under these circumstances, the prevailing view in this Commonwealth is that the prosecution does not violate discovery rules when it fails to provide the defense with evidence that it does not possess *and of which it is unaware* during pre-trial discovery, even if the evidence is in police custody. *Commonwealth v. Starks*, ____ Pa.Super. ____, 450 A.2d 1363 (1982). *See also, Commonwealth v. Glass*, 495 Pa. 405, 434 A.2d 707, 711 (1981) (opinion in support of affirmance) *cert. denied, Glass v. Pennsylvania*, ____ U.S. ____ 102 S.Ct. 1984, 72 L. Ed.2d 450 (1982).

4. The testimony of the Commonwealth's original witness, Joseph DiFillippo, went through many gyrations during the course of this litigation. Ultimately, DiFillippo recanted his position for reasons which the Commonwealth feared resulted from threats of physical force against his person. In view of this, the Commonwealth concluded that it was necessary to conceal Waddell's identity to prevent a similar situation from affecting his testimony or endangering his well being, especially in view of his tender age. The trial judge addressed this issue at trial and concluded that the concealment was justified under these circumstances.

evidence, including the identity of witnesses) does not mandate discovery of a witness' identity in all cases. Orders compelling such discovery are left to the discretion of the trial court. *See* Pa.R.Crim.P. 305(B). Moreover, the scope of discovery under the rule must be consistent with the "protection of persons". *See* Pa.R.Crim.P. 305, comment. Under these circumstances, the trial court's decision allowing Waddell to testify was not inconsistent with the applicable rule of discovery.

The hard edges of the question, however, are resolved in the case at hand because the careful trial judge obviated any injury by offering full continuance to appellant to prepare for or investigate any difficulty caused by the late disclosure. The offer was refused, the witness extensively examined, and no request for delay or mistrial was made. *See* Notes of Testimony 12/1/78, at 1.91-1.202. Under these circumstances, i.e., where the identity of a witness unfavorable to the accused is withheld from the defense until trial, no reversible error occurs if the defense is given ample opportunity by the trial court to ask for a continuance, cross-examine the witness, or take whatever remedial steps are necessary and reasonable under the circumstances. *See Stetler; Hamm;* 474 Pa. 487, 378 A.2d 1219 (1981); *Commonwealth v. Layman,* 290 Pa. Super. 244, 434 A.2d 735 (1981).[5] Thus, the learned trial judge offered every advantage to cure any possible injury resulting from the alleged non-disclosure. For this and other reasons set forth above, appellant's challenge to the admission of Waddell's testimony must fail.[6]

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5. Appellant's contention that he has a claim under *Brady v. Maryland,* 373 U.S. 83 (1963), concerning the testimony of Waddell, is without merit since the witness' testimony was in no way exculpatory or favorable to the accused.

6. The Commonwealth under the rules is required to advise the court of its intention to withhold the identity of a witness. Here the Commonwealth's failure to do this caused no prejudice. However, the prosecution must not make an ex-parte determination of what witnesses it plans to disclose or not disclose.

Appellant's contention that he received ineffective assistance of counsel because no motions were made during pre-trial discovery to compel disclosure of the identity and statements of Waddell and Melino must fail. As pointed out above, the arguments upon which appellant would rely to compel discovery concerning these witnesses are meritless. Failure of counsel to undertake useless tasks cannot be regarded as ineffective assistance. *Commonwealth v. Robinson*, 485 Pa. 490, 402 A.2d 1379 (1979); *Commonwealth v. Roach*, 479 Pa. 528, 388 A.2d 1056 (1978).

Defense counsel's decisions to cross-examine Waddell and call Melino as a defense witness rather than ask for a continuance upon discovering that the Commonwealth would produce these witnesses are also no basis for a claim of ineffective assistance. There is no indication by appellant that these courses of action were unreasonable or prejudicial to appellant's defense. *See Commonwealth v. Roman*, 494 Pa. 440, 431 A.2d 936 (1981); *Commonwealth v. McIntyre*, 492 Pa. 306, 424 A.2d 874 (1981).

Appellant's remaining allegations of ineffective assistance suffer from the same infirmity. They include counsel's failure to argue for a lower degree of murder and his failure to move for suppression of the in-court identification of the accused by Waddell. Because each of these claims argues that alternative trial strategies should have been pursued, we must apply the well established principle set forth in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967). In *Maroney* this Court observed that some reasonable basis to effectuate the best interests of the accused must be found in trial counsel's actions. Our review of the record provides no basis for finding that any of defense counsel's decisions or strategies lacked a reasonable basis in serving appellant's best interests.[7] On

7. Appellant argues that certain aspects of defense counsel's trial strategy were influenced by the prosecutor's assertedly mis-

the contrary there is ample indication that the defense was conducted with considerable deft which did not escape the attention of the trial court. *See* Notes of Testimony 12/21/78 at 6.68.

Appellant next argues that the trial court erred in failing to sequester the prosecutor during the hearings on post-verdict motions in which the prosecutor appeared as a witness. The trial judge permitted the prosecutor, who had represented the Commonwealth at appellant's trial, to remain in the courtroom during the hearings. Appellant now requests this Court to burden the Commonwealth with the absurd requirement that two prosecutors be prepared to represent the Commonwealth in every case in the event the original prosecutor might be called as a witness at post-trial hearings. This argument is patently frivolous and bereft of any sound basis in logic or law.

Appellant's final contention is that if he had known of the eye witness Waddell, he would not have waived trial by jury. Because this is belied by the fact that the Commonwealth never denied the existence of an eye

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leading statements that only one witness would be called at trial by the Commonwealth. As a result of this alleged deception, appellant further argues, this Court is compelled to choose between a finding of prosecutorial misconduct or ineffective assistance of counsel, i.e., if the prosecution did not mislead the defense then defense counsel was ineffective for failing to ascertain the identity of the Commonwealth's witnesses. To the extent that appellant's claim of ineffective assistance of counsel relies on the Commonwealth's alleged deception, it is meritless. The record clearly indicates that the prosecutor, Mr. Murray, emphatically denied, contrary to the assertion of appellant, that he ever told defense counsel that the Commonwealth would produce only one witness. *See* Notes of Testimony on Post Trial Motions, Vol. III at 3.53. Thus, there was no deception. Furthermore, our finding of no prosecutorial misconduct in this case does not compel a conclusion that defense counsel is not ineffective for failing to take action on the basis of information relating to witnesses of which he is unaware. *Commonwealth v. Ford*, 491 Pa. 586, 421 A.2d 1040 (1980); *Commonwealth v. Johnson*, 479 Pa. 60, 387 A.2d 834 (1978); *Commonwealth v. Jones*, 477 Pa. 266, 383 A.2d 926 (1978).

witness, this contention is meritless. *See* Note 6 supra. Furthermore, there are no differences in a defendant's rights or the legal principles involved between a jury case and a non-jury case. The same rules of evidence apply and the same burdens of proof remain. As stated by this Court in *Commonwealth v. Owens*, 444 Pa. 521, 281 A.2d 861 (1971):

> [T]here are no fundamental differences in a defendant's rights or legal principles involved between a jury and a non-jury case . . . . the same rules of evidence apply to a trial without a jury as to one with a jury.

Owens, 444 Pa. at 525, 281 A.2d at 863. *See also, Commonwealth v. Paquette*, 451 Pa. 250, 301 A.2d 837 (1973); *Commonwealth v. Lewis*, 193 Pa.Super 508, 165 A.2d 98 (1960); *Commonwealth v. Taylor*, 193 Pa.Super. 386, 165 A.2d 134 (1960); *Commonwealth v. Salkey*, 188 Pa.Super. 388, 147 A.2d 425 (1958).

Here, appellant voluntarily, after a full and extensive colloquy, chose a non-jury method of trial. *See* Notes of Testimony 12/1/78, at 1.4-1.15. The fairness of that method is not determined by the type of evidence offered or the number of witnesses introduced. Absent error of law, bias or prejudice there is no inherent unfairness in a bench trial as contrasted to a trial by jury. We cannot accept that, once chosen, one form of the right to an open and public trial is less productive of fairness than the other or that one is less capable of rendering a fair verdict upon the same evidence. Moreover, the appellant here made no motion for continuance or mistrial. He cannot await a verdict without protest and then complain.

Accordingly, the judgments of sentence imposed on appellant are affirmed.

Mr. Chief Justice Roberts, and Mr. Justice Larsen concur in the result of this opinion.

Former Chief Justice O'Brien did not participate in the decision of this case.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA	COURT OF COMMON PLEAS
vs	JUNE TERM, 1978
SAMUEL BONACCURSO	NO. 115, 116, 117, 118

OPINION SUR DENIAL OF DEFENDANT'S POST-TRIAL MOTIONS

Samuel Bonaccurso has been found guilty of murder in the first degree by this court sitting without a jury.

Defendant was represented at trial by Robert Simone, Esquire, and post-trial motions and a brief were submitted by Mr. Simone. Due to the nature of the post-trial allegations, Mr. Simone was permitted to withdraw and Stanford Shmukler, Esquire, appeared on defendant's behalf and, with leave of court, filed additional assignments of error together with several briefs. An evidentiary hearing in connection with certain of defense averments was thereafter held.

The brief filed by Mr. Simone is confined to the two charges that the trial court improperly permitted the testimony of the eyewitness, Andre Waddell, and the further allegation that the defendant was denied his constitutional right to a trial by jury because his waiver was based on erroneous advise to defendant by Mr. Simone to the effect that the Commonwealth's evidence was insufficient for conviction, it being defense counsel's impression that the Commonwealth did not possess an eyewitness. Analysis of the brief filed by Mr. Shmukler indicates the following additional assignments:

1. The Commonwealth improperly withheld information as to the eyewitness, Andre Waddell, and the claimed eyewitness, James Melino.
2. The defendant was deprived of the effective assistance of counsel, namely, Robert Simone.
3. Error was committed when the Court declined to sequester Commonwealth counsel, Joseph Murray, during the post-trial evidentiary hearing.

The most serious contention of defense would appear to be the allegation that the defendant was deprived of his constitutional right to a trial by a jury. We shall, therefore, reserve discussion of that issue until last and focus initially upon what we perceive to be the issues of lesser importance.

1. THE TRIAL COURT IMPROPERLY PERMITTED THE TESTIMONY OF THE EYEWITNESS, ANDRE WADDELL.

By letter of June 20, 1978, defense counsel Simone wrote to Joseph Murray, Chief of the District Attorney's Homicide Division, and requested pre-trial discovery and inspection pursuant to Rule of Criminal Procedure 305(A). Paragraph "D" of defense counsel's letter inquired as to any identification of the defendant "by voice, photograph, or in-person identification." Paragraph "G" of said letter requested the names and addresses of eyewitnesses. Mr. Murray's letter in response advised defense counsel that the Commonwealth would comply with Paragraph "D" and supply the circumstances and results of identification of the defendant as requested. The request to furnish the names and addresses of eyewitnesses was denied by the Commonwealth. Defense counsel was thus notified in clear-cut fashion that the Commonwealth resisted supplying the names and addresses of eyewitnesses and that defense must, therefore, take additional steps if it sought such information — which the defendant did not undertake. Information was never supplied by the Commonwealth as to identification of the defendant by "voice, photograph, or in-person" for the reason that Andre Waddell never participated in any such procedures and did not, in fact, identify the defendant until Waddell testified at trial.

Under the above circumstances, the court properly refused to bar the testimony of Andre Waddell at trial in the absence of any showing of Commonwealth violation of the rules governing pre-trial discovery. When the

presence of Andre Waddell in court for the purpose of testifying was made apparent to defense counsel, bearing in mind that the trial was then and there underway, this court, on record, volunteered to grant the defense such reasonable indulgences as were necessary to permit appropriate investigation and prepare for cross-examination.

2. THE COMMONWEALTH IMPROPERLY WITHHELD INFORMATION AS TO THE EYEWITNESS, ANDRE WADDELL, AND THE CLAIMED EYEWITNESS, JAMES MELINO.

Heroic efforts have been made by the defense to elevate James Melino to the status of an eyewitness to this occurrence. Melino's existence was disclosed to the defense by the Commonwealth, and *he testified for the defense at trial.* Analysis of his testimony and his various statements clearly establishes that Melino never observed anything of relevance to this case.

Melino was employed as an attendant at a gasoline station at 13th Street and Washington Avenue, located about one-half of a city block north of the crime scene (1125 South 13th Street). While servicing a customer's automobile, Melino heard noises variously described by him as "fire crackers" or "like someone banging on a garage door." About one and one-half minutes later, he observed an automobile variously described as a brown Porsche and, at trial, as a Pacer, being driven at a slow rate of speed on 13th Street until it reached Washington Avenue, *where it stopped for the traffic light.* After the traffic light changed, the car turned into Washington Avenue in front of the gas station and then sped off. Although the defense and the Commonwealth have rather exhaustively discussed the significance of Melino's testimony and the circumstances surrounding various of his statements, we are of the firm opinion that all such references must be ignored. It strikes us as the height of absurdity to contemplate that Melino was a witness,

much less an eyewitness, to any part of this occurrence. To conclude that whatever car was observed by Melino could possibly be the murder car, and to further conclude that the driver of an automobile almost simultaneously engaged in a murder would proceed in sluggish fashion and carefully observe the traffic laws, is a bit too much for our sensibilities.

The main comfort which the defense claims was extractable from Melino's testimony and statements consists of Melino's observation that the passenger in the car (mentioned by earlier witnesses as the killer) had an abundance of facial hair, whereas this defendant was clean shaven. Melino's testimony, in our opinion, did not begin to shed any light whatsoever in that area.

Previously, the circumstances surrounding the withholding of the name of Andre Waddell as an eyewitness have been analyzed and the judgment reached that the Commonwealth was not guilty of any impropriety as to Waddell.

3. THE DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, NAMELY, ROBERT SIMONE.

This assignment alleges the ineffectiveness of Robert Simone in failing to move to suppress the identification of eyewitnesses, named by the defense as Waddell and Melino. We need not consider the situation as to Melino for reasons previously stated. As to Waddell, admittedly an eyewitness, it must be recognized that Waddell did not participate in any pre-trial procedures relative to identification, but, rather, identified the defendant for the first time at trial. Legitimate reasons existed for the Commonwealth to refrain from supplying any information pretrial as to Waddell. Waddell was a fourteen-year-old boy who never volunteered information to the police. When the Commonwealth learned of his existence, Waddell's mother was understandably reluctant to expose her son to possible repercussions, and

Commonwealth was required to reassure Waddell's mother that his presence would be shielded. Recalling that the defense witness, DeFillipo, had recanted his repeated on-the-scene and res gestae identification of this defendant, it cannot be said that the Commonwealth's precautions as to Waddell were unnecessary.

It is well settled that counsel is not ineffective where counsel does not pursue a meritless course of action. Nowhere in any of the evidence adduced at trial *or to this date* does anything appear other than the fact that Waddell well knew this defendant because of his employment at the garage where the murder took place, where he had observed this defendant on numerous prior occasions. In the absence of any identification procedures whatsoever, it is starkly apparent that any motion to suppress the identification by Waddell would have been fruitless.

4. ERROR WAS COMMITTED WHEN THE COURT DECLINED TO SEQUESTER COMMONWEALTH COUNSEL, JOSEPH MURRAY, DURING THE POST-TRIAL EVIDENTIARY HEARING.

Over defense objection, this court permitted Joseph Murray, the Assistant District Attorney in charge of this prosecution and the post-trial hearings, to remain in the courtroom despite the entry by the court of a sequestration order as to all Commonwealth and defense witnesses. It is now contended that this action by the court somehow prejudiced the defendant. At the outset, the rule is well established that the matter of sequestration of witnesses rests within the discretion of the trial court (*Commonwealth v. Howard,* 312 A.2d 54, 226, Pa. Super 22 (1973), cert denied *Howard v. Pennsylvania,* 95 S. Ct. 184, 419 U.S. 900, *Commonwealth v. Kravitz,* 400 Pa. 198, 161 A.2d 861 (1960), cert. denied, 365 U.S. 846 (1961), *Commonwealth v. Holland,* 398 A.2d 1026), although such discretion may not be abused. The gravamen of the defense contention appears to be that, in

some fashion, Mr. Murray was thus permitted to shape his testimony to conform with that of other Commonwealth witnesses. In the exercise of our discretion, we realized that a prosecution attorney at the onset of such an evidentiary hearing cannot be deemed to know the contents of the opposing case to the point where it should appear that the prosecuting attorney *must testify*. Further, this court felt that it was well able to hear all of the testimony, whether stated in Mr. Murray's presence or not, and take appropriate steps if Mr. Murray's presence was somehow advantageous to the prosecution and prejudicial to the defense. Nothing of this nature, in our opinion, occurred during the post-trial evidentiary hearing.

5. THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY.

Essentially, this assignment appears to charge that defense counsel Simone was unaware of the eyewitness, Andre Waddell, and thus appraised the Commonwealth's case as being sufficiently weak to prevent a conviction or to overcome the presumption of innocence. Based on this assessment, Simone discussed the question of waiver with this defendant and advised his client to waive. It is asserted that such a waiver would not have been forthcoming if knowledge of Waddell was in counsel's possession. The withholding by the Commonwealth of information as to Waddell, it is asserted, thus induced counsel's advice which thus mislead the defendant into waiving his constitutional right to a trial by a jury. No charge is made to the effect that the waiver colloquy was incomplete or erroneous in any way.

For a variety of reasons, we are unable to accept this assignment as constituting appropriate grounds for a new trial.

During the meticulous colloquy prior to acceptance of the waiver, Page 1.12, et seq., contains the following questions and sworn answers from the defendant:

"Q. Are you making this decision not only as a result of talking with me, but also freely and voluntarily and in making your own decision?
A. Yes."

Earlier in the colloquy, the defendant responded in the negative to the question as to whether "anyone made any promises or threats" to induce him to waive. Further, the following question and answer occurs:

"Q. Do you state that the answers that you are giving today are answers that will bar you further on down the road if you should decide at some later point that you did not want to waive a trial by jury in front of Judge Malmed? Do you understand?
A. Yes."

Although a full opportunity was accorded for the defendant to testify during the post-trial evidentiary hearings on this issue, he never testified that he was mislead or deceived by counsel or anyone else and the record is barren of any indication from the defendant that he relied on his counsel's representations. The possibilities of a conviction were made quite apparent to defendant, as a reading of the colloquy will disclose. Under all of the above circumstances, defendant cannot now be heard to complain.

The above comments would appear to be dispositive of this assignment, in the sense that its very foundation has been shown to be non-existent, but we are persuaded that this assignment lacks merit for additional reasons:

1. The defense never moved for permission to withdraw the waiver and proceed with a jury when the nature of Waddell's testimony became known. A defendant should never be permitted to sit back at such point and claim the right to exercise other options at a later date, after an adverse result.

2. The grant of a new trial upon a representation that counsel had mislead a defendant by an erroneous appraisal of the Commonwealth's case opens a Pandora's box. The interchange between defense counsel and his client is obviously privileged and a forbidden area for the court to penetrate during a colloquy. To permit such a travesty would simply mean that all convictions would be suspect upon a showing of counsel's estimations unattributable in any way to Commonwealth wrong-doing.

3. Assuming arguendo that the defendant was precluded by his own counsel's action from his constitutional right to a jury trial, a defendant must demonstrate some prejudice flowing from that event. We do not think it should be presumed that a defendant has been prejudiced by virtue of the fact that he was tried by a judge rather than a jury. There is no evidence, empirical or otherwise, that a bench trial is not conducted with the same awesome adherence to responsibilities required of a jury. To hold otherwise would constitute a gratuitous denigration of judicial integrity. Constitutional rights do not exist in a vacuum. Thus, for example, the absence of a defense counsel from a post-arrest police lineup may be the deprivation of a constitutional right, but it certainly cannot be held to prejudice a defendant in any way where the result of the lineup consisted of a failure to identify. The instant defendant has failed to indicate any prejudice.

4. The case of *Commonwealth v. Carey*, 235 Pa. Superior 366, 340 A.2d 509 (1975), relied upon by defense, is without application. In that case, it was confirmed that counsel had deceived the defendant into waiving a jury trial by the "promise" that defendant would receive a sentence which was not then forthcoming. In the case at bar, no such promises were present and, at best, the defendant was

mislead by a unilateral assessment of the Commonwealth's evidence by his attorney.

5. A review of the painstaking colloquy in this case demonstrates that this defendant was completely aware of his intentional relinquishment of a right which was well known to him and that he fully understood the nature and consequences of his waiver. (*Johnson v. Zerbst*, 304 U.S. 458 (1938); *Commonwealth v. Garrett*, 439 Pa. 58, 266 A.2d 82 (1970).) To impose the further requirement that all predictions, assessments, and appraisals discussed inter se by counsel and a defendant be disclosed in the course of a waiver colloquy would create an insurmountable burden for the court. In practicality, the trial judge would never be able to conclude whether a defendant was waiving because of the reasons adduced during the colloquy or for some undisclosed reason which could be later asserted, in the event of a conviction.

6. We are well aware that *Commonwealth v. Baldwin*, 219 Pa. Superior, 153, 380 A.2d 654 (1971) is to the effect that if counsel's advice is based on inadequate or erroneous information, the waiver may be set aside. *Baldwin* is clearly applicable, dealing as it does with a guilty plea induced by the advice of counsel who did not deign to familiarize himself at all with his client's case.

Defendant's post-trial motions are denied.

BY THE COURT:

_____

Malmed, J.

DATE: August 21, 1980

APPENDIX C

Supreme Court of the United States

No. A-791

SAMUEL A. BONACCURSO,

Petitioner,

v.

PENNSYLVANIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 28, 1983

/s/ WILLIAM J. BRENNAN
Associate Justice of the Supreme Court of the United States

Dated this 24th
day of March, 1983